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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1096.

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, ET AL.,
*Appellants,*

v.

UNITED STATES, ET AL.

## REPLY OF APPELLANTS TO THE MOTION OF APPELLEES TO AFFIRM THE FINAL JUDGMENT OF THE STATUTORY COURT.

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This is another case involving the validity of an order of the Interstate Commerce Commission. While clear in its statement of ultimate conclusions it, like some others recently before the Supreme Court, in respect to the findings, is cryptic in expression, in places very ambiguous, and in some essentials lacking any findings at all. Of the ten voting Commissioners three dissented. One spoke of the order as "arbitrary."

The matter involved is of exceptional importance to the entire motor carrier industry which now grosses nearly $1,000 million annually. The appellants here represent

much of it. The order in principle cuts deeply into the validity of the whole form and substance of the motor carrier national freight rate structure and is so intended by the Commission. Upon the outcome depends the future competitive place of that mode of transportation and the survival of our traditional national transportation policy which so much favors competition of a healthy sort.

The governing statute provides for review of the validity of the Commission's orders by a special statutory court; and it is further provided that direct appeal to the Supreme Court lies in such cases. This scheme of judicial review, particularly the right of direct appeal to the Supreme Court, reveals an important public policy. It revolves around the conception that comprehensive consideration and decision by the Supreme Court is deserved in these complex transportation rate cases because of their intrinsic importance and because of the guidance which such decisions of the Court furnish in the general administration of the statute.

The court below did not invalidate the Commission's order. But in its written opinion there is not even a statement, and much less discussion, of any ground of invalidity which the pleadings, briefs, and oral argument of the plaintiffs before it presented. That court preferred merely to adopt and paraphrase the Commission's own reports and to declare that in its judgment the action of the Commission was "right." No aid from the court's opinion, on the important issues involved, is therefore to be had.

Government counsel now move, nevertheless, to affirm. The mere right to file such a motion cannot be questioned but the propriety of its filing and thus forcing decision out of turn is doubtful in view of the nature of the case and the broad issues involved.

In the motion it is said that there is no "substantial question" presented. But that assertion of view rests upon the statement of contentions which appellants do *not* make; it omits to present the contentions which appellants *do* make; and it attributes to the Commission needed findings which

were *not* made. In short "if the issues in this case were framed as the motion frames them" the situation might be different. When, however, the real issues are stated, as they are about to be, it is believed the Supreme Court will determine that not only are the questions substantial but that there is no rational basis on which the Commission's decision and order can find support in the statute which it administers.

## I.

## THE ESSENTIAL FACTS.

As on most other commodities the railroads maintain two freight rates per 100 pounds on linoleum from eastern manufacturing points to the West. The lower of them (45 per cent of first class) applies when any individual shipper chooses to tender for shipment at one time 30,000 pounds or more on one bill of lading to one consignee at one destination. The other and higher rate (70 per cent of first class) applies when the individual shipper may tender for shipment any quantity less than 30,000 pounds.

On their part the motor carriers similarly filed with the Commission their own tariffs containing the same 45 per cent basis on individual shipments weighing 30,000 pounds or more and 70 per cent of first class on the smaller weight individual shipments. In addition, however, the motor carrier tariffs also provided a rate basis of 47.5 per cent of first class to be applicable when any individual shipper might tender as much as 20,000 pounds but not as much as 30,000 pounds on the one bill of lading to one consignee. That is to say, while meeting the railroad 45 per cent rates on the larger but normal weight shipments of 30,000 pounds or over and while meeting the railroad rates on the small weight shipments (70 per cent of first class) the motor carriers also undertook to make available an intermediate rate of 47.5 per cent for the *benefit* of those individual shipments having the substantial weights of 20,000 pounds or more up to but not including 30,000 pounds. The offer of

that choice of alternative rates and minimum weights was unrestricted. Any shipper, small or large, would be at liberty to use either rate at will, choosing for itself the weight to be shipped at any one time and paying accordingly.

No shippers protested or appeared in opposition at the hearing when the evidence was taken. The Commission initially suspended the operation of the new tariffs, pending hearing, only upon protest of certain western railroads who, however, withdrew early in the hearing upon clarification of the intended application of the proposed rates.

In their evidence before the Commission (here before the Court) the respondent motor carriers explained that linoleum shipping weights of 30,000 pounds or more are entirely normal and usual in that branch of industry as evidenced by the railroad carload rates of 45 per cent which are dependent upon the tendering of individual shipments weighing that much. It was further explained that for the motor carriers to share on equal terms and conditions with the railroads in the transportation of those heavier ordinary shipping weights it was necessary for them to publish in their tariffs the same as the railroad carload rates and minimum weights.

It was conceded that by reason of the operation of varying state "barrier" laws, and the consequent limitations upon the sizes of motor truck vehicles, accommodation of as much as 30,000 pounds of linoleum in one shipment from the East to the West would require the motor carriers to load no more than about 22,000 pounds in one vehicle and to load the overflow into a second vehicle in which the same or a different kind of freight of the same or other shippers would be transported. While thus the overflow would require the partial use of a second vehicle the facts of the case in that regard bear no resemblance to others in which the Commission has rightly forbidden preferential "trainload" or "multiple car" rates which only a few very large shippers could use.

The motor carrier offer of an intermediate rate of 47.5 per cent on shipments weighing between 20,000 and 30,000

pounds was said in the evidence only to be intended to attract shippers to the patronage of the motor carriers by making available the choice of a slightly higher rate in consideration of the somewhat lower minimum shipping weight of 20,000 pounds capable of being loaded into single vehicles.

While there is a material difference between the operating expense of transporting the small shipments (at the 70 per cent rates) and either the 20,000 or 30,000 pound shipments the difference between the 45 per cent and 47.5 per cent bases, with their respective differences in the required minimum shipping weights, was not sought to be predicated upon any showing of a difference in motor carrier operating expense per 100 pounds. That particular rate distinction is grounded only upon the force of competition between the motor and rail carriers because of which, with their somewhat smaller vehicles, the motor carriers with respect to normal trade units of shipment (30,000 pounds) seek to equalize their quantity rates with those of the railroads whose freight cars are somewhat larger than the individual truck trailers legally permitted to be used in some portions of the country.

## II.

## THE ULTIMATE CONCLUSIONS OF THE COMMISSION.

By way of ultimate conclusion Division 3 of the Commission (under the wrong designation of "findings") declared that each of the three motor carrier rates per 100 pounds was just and reasonable and otherwise lawful but that it would be unjust and unreasonable to govern either the 45 per cent or the 47.5 per cent rates by a minimum weight greater than 20,000 pounds. A permanent order of suspension was entered.

Review by the full Commission was had, without avail, although there had been a prior decision of the full Commission in an earlier case contrary to the view of Division 3 in the present case. Upon that review in the present case

ten Commissioners voted and three of them dissented. The decision in the other prior full Commission case was in terms reversed.

In its opinion and order in the present proceeding the majority of the full Commission affirmed the conclusion of Division 3 that either 45 per cent or 47.5 per cent of first class per 100 pounds would be just and reasonable. But it was further held to be unjust and unreasonable to govern the 45 per cent of first class rates by a minimum weight of 30,000 pounds or anything else in excess of 20,000 pounds.

The majority of the full Commission also concluded (unlike Division 3) that there would result unjust discrimination as between shippers should the motor carriers offer at the same time 45 per cent on individual shipments weighing 30,000 pounds or more and 47.5 per cent on individual shipments weighing between 20,000 and 30,000 pounds.

There was no determination that motor carriers may not lawfully transport, even though requiring the partial use of a second vehicle, individual shipments that might be tendered weighing as much or more than 30,000 pounds so long as the rate stated in the tariffs may not call for a minimum shipping weight greater than 20,000 pounds—that being the quantity which the Commission says may be loaded with the one truck vehicle.

And yet the Commission, by its final order in this case, would force the motor carrier to do either of two things: if they publish the same 45 per cent rate basis which the railroads do it would have to be made available on shipments of as little as 20,000 pounds whereas the railroad 45 per cent basis is applicable only to shipments of 30,000 pounds or more. That, in effect, would compel the motor carriers to do something *which their competition does not require* by affording to shippers a quantity rate corresponding to the railroad quantity rate but calling for a lesser weight to be tendered than the railroads require. It would put the railroads at a disadvantage and prompt them further to reduce their own rates per 100 pounds. (See *Re Coffee from Jacksonville*, 34 M. C. C. 625.) In the alternative

motor carriers would be required to forego an equality of rate per 100 pounds as between their services and those of the railroads by charging only the one rate of 47.5 per cent of first class to be governed by a minimum weight of 20,000 pounds even on the larger shipments of 30,000 pounds as against the lower railroad 45 per cent basis which is governed by the 30,000 pound minimum. As the well-established commercial trade unit of sale and shipment is 30,000 pounds the lower railroad rates, although governed by the 30,000 pound minimum, would attract most of the business.

It is therefore evident that the intent of the Commission majority is to prevent the achievement of a competitive rate equality between the railroads and motor carriers in respect to ordinary trade units of quantity shipments of freight in this country. To force the common carrier trucking companies out of that very large field of traffic, even though they can "afford it," is the real purpose to be deduced. The asserted predicate for it is solely the difference (not always so) in the sizes of trucks and railroad box cars as a consequence of individual and varying state "barrier" highway laws. At least that fact is pointed to by the Commission as the controlling reason for its decision.

## III.

## QUESTIONS OF LAW INVOLVED.

As the action of the Commission would, in principle, condemn a large part of the entire prevailing motor carrier rate structure on thousands of commodities throughout the United States and cripple the future course of the industry the matter is one of urgent importance both to the transportation agencies and the shipping public.

It is believed, however, that the Commission's order is not within its authority and grossly misconstrues the statute. Its validity is assailed on these specific grounds:

(a) In terms the Commission majority acknowledges that its decision is based upon "policy"—something which is wholly beyond its authority.

(b) The Commission does not possess a power of economic dictatorship to exclude common carriers by motor vehicle from sharing in the transportation of long-established trade units of quantity shipments although exceeding somewhat that may be carried only in a single truck.

(c) To condemn as unreasonable motor carrier rates on quantity shipments well within the limits of ordinary commercial trade units of sale and transportation, merely because individual motor carrier vehicles may not contain as much freight as individual railroad cars, is arbitrary and unreasonable, and the Commission's conclusion in that respect lacks any findings or substantial basis whatsoever in its reports or the record before it.

(d) The conclusion of unjust discrimination between shippers with respect to these three motor carrier rates and minimum weights is patently erroneous as a matter of fact and therefore as a matter of law. As each and every shipper may choose without restraint (actual or economic) whether to tender the one shipping weight or the other there can be no proper conclusion of discrimination between shippers.

(e) In rejecting totally the competitive situation between motor and rail carriers here involved the action of the Commission, on its face, was purely arbitrary and did not rest upon any findings made or rule of reason within its administrative authority.

(f) The court below improperly supported the Commission's order by its own interpolated conclusion that "efficiency of truck operation" was being promoted by the Commission.

## IV.

## ACKNOWLEDGMENT BY THE COMMISSION MAJORITY THAT ITS DECISION WAS BASED UPON "POLICY".

Three times heretofore the Supreme Court has declared the Commission is wholly without authority to enforce a "policy" of its own as distinguished from administration of the requirements of the Interstate Commerce Act:

> *Southern Pacific R. Co.* v. *I. C. C.*, 219 U. S. 43.
> *I. C. C.* v. *Union Pacific R. Co.*, 222 U. S. 541, 554.
> *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, 525.

Here, in the teeth of those controlling decisions, the Commission majority, *in terms*, says its own decision and order are the consequence of a "policy" which it has evolved. The language of Division 3 was: "We adopt as a policy the condemnation as unreasonable" of a motor carrier minimum weight calling for an overflow into a second vehicle although within established trade units of shipment. The full Commission majority upon review said: "We shall follow the policy announced in the prior report herein" with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers.

Therefore at the threshold of this case it is observable that the Commission has characterized its own action in terms convicting it of an intentional distortion of the provisions of the statute to serve a "policy" of its own. Not unnaturally there were a number of dissenters and one of them properly spoke of the majority action as "arbitrary".

It is the plain effort of the Commission majority to force motor carriers out of the "quantity" freight business. This it seeks to do by imposing upon them the requirement that their rates be governed by minimum weights measured solely by the existing carrying capacities of individual motor trucks although such minimum weights would be less than ordinary trade units of shipment call for. There is

left by the order to the motor carriers only the devil's choice of having but one quantity rate per 100 pounds (higher than the railroad rate) in consideration of the lower minimum, or else, while permitted to charge the same rate per 100 pounds as the railroads do, yet to make it available on a lesser quantity than the railroads require—a concession not necessitated by the force of competition and which would in turn necessitate an offsetting rate reduction by the railroads.

This revolutionary conception of national "policy" strikes at the foundations of the motor carrier industry and the stability of transportation as a whole.

Certain it is that the Commission's characterization of its action as one dictated by "policy" discolors the attempt on its part to make that policy effective by a mere ultimate conclusion of "unreasonableness" and "discrimination between shippers" unaided by any cogent supporting considerations.

## V.

## THE ULTIMATE CONCLUSION OF UNREASONABLENESS.

As stated, by way of ultimate conclusion, so arrived at as a matter of policy, the Commission majority asserts that it is "unreasonable" for motor carriers to govern their quantity rates by minimum weights somewhat greater than can be loaded into single motor vehicles. This view was declared although the quantity rates and condemned minimum weights would correspond not only to established trade units of commercial shipments but to the railroad carload rates and minimum weights. No fault was found with the stated rates per 100 pounds.

That is to say the Commission determined that the 47.5 per cent motor carrier rates to be governed by a minimum weight of 20,000 pounds (but applying as well to shipments of greater weight) *would not yield profits too high* nor be otherwise unreasonable. Similarly it determined that the

lower competitive 45 per cent rate basis would not be unjust and unreasonably low but disallowed the requirement that (like the railroads) it be available only on individual shipments weighing 30,000 pounds or more.

The court below (misreading the reports of the Commission) fell into the erroneous assumption that there are two classes of shippers, i. e. those who are "large" and those who are "small" and that the weights of their individual shipments are governed accordingly. (The Commission made no such finding and none would have been justified by the record before it.) Having indulged that error of mere assumption, contrary to the facts, the court below considered that motor carriers "ought not" to retain "the greater profit" from the 47.5 per cent basis since it was not shown that their operating costs are less per 100 pounds on 30,000 than on 20,000 pound shipments. The reasoning of the court below was that if motor carriers "can afford" 45 per cent rates for 30,000 pounds it would be unjust for them, without added expense, to make also *available* the slightly higher rates of 47.5 per cent to be governed by the 20,000 pound minimum. In that way the court below, without judicial authority, in effect condemned as unreasonably high the 47.5 per cent basis. The Commission itself did not so. A somewhat blurred confusion of questions of discrimination and reasonableness is revealed.

All of these seeming complications arise from one single circumstance. In stretching and straining to find some sort of legal predicate of "unreasonableness" for its mere "policy" the Commission and the court below involved themselves in a tangled skein of reflection. Years ago, soon after the Interstate Commerce Act was passed in 1887, Judge Thomas Cooley, the Commission's first Chairman, declared in a comprehensive opinion that quantity rates for railroad shipments were lawful *if* the required minimum weights be not greater than those conforming to the *usual* trade units of sale. Otherwise, he said in behalf of the Commission, the making of lower rates based upon such

large shipping weights as that only a few shippers could take the advantage offered by the tariffs would be unduly discriminatory and therefore not lawful. (*Providence Coal Company* v. *P. & W. R. Co.*, 1 I. C. Rep. 163). It was there indicated (years before motor truck haulage) that an appropriate minimum weight to govern railroad quantity rates would generally be a single carload. In later years the Commission with consistency stated and applied this same view *Anaconda Copper Mining Co.* v. *C. & E. R. Co.*, 19 I. C. C. 592; *American Round Bale Press Co.* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 458. The railroad claim of lower operating expense on multiple car shipments was rejected as immaterial. See however *Re Molasses*, 235 I. C. C. 485, where still later the further element of competition for large quantity shipments was recognized as between railroad and water carriers.

Government counsel, in their motion to affirm, here agree with the appellants that what the Commission is now attempting to do is to make applicable to motor carriers the doctrine that the minimum weight to be applied to their quantity rates shall conform only to the carrying capacities of the individual trucks generally in use; even when those minimum weights would be less than commercial trade units of shipment and notwithstanding the railroad rates and minima which reflect them. The legal error of that "policy" in reason and result is apparent.

When, years ago, the Commission so decided that railroad carload quantity rates should be governed by established commercial trade units of shipment not greater than individual railroad car capacities it was seeking only to prevent undue advantages being derived by the exceptionally large shippers whose units of sale might be greater than those of the general run of commercial establishments.

Here the motor carriers do not seek to violate the principle of that broad rule. There is no proposal by them here to establish minimum weights larger than the ordinary commercial units of sale. No "multiple truck" rates are in-

volved such as "multiple car" rates of railroads that have long been condemned. There is here no undertaking to establish low preferential rates for the benefit of only a few large shippers whose units of sale and shipment would be greater than most others in the same trade.

That the 30,000 pound motor carrier minimum weight here would as a matter of physical operation require a small overflow to be loaded into a second truck vehicle is of no concern to shippers and should not be to the Commission. It does shippers no harm whether the freight be moved in one or in two trucks, and the Commission did not say otherwise. Freight haulage by motor carriers is a very flexible type of transportation. The remainder of the space in the second vehicle would be occupied by other freight of the same or a different kind of the same or different shippers. While there is no showing of lower operating expense per 100 pounds in transporting 30,000 than when transporting 20,000 pounds it is also true that there is no showing that the expense per 100 pounds would be greater for the larger than for the smaller quantity, yet the Commission did not deem the higher 47.5 per cent basis excessive. It is not questioned by the Commission that either 20,000 or 30,000 pound loads may be transported at less operating expense than small shipments to which the 70 per cent basis would apply. (*I. C. C.* v. *D. L. & W. R. Co.*, 220 U. S. 235, 240)

Nor could shippers complain when motor carriers govern their quantity rates by the same minimum weights as those which the railroads prescribe for carload shipments. They are not injured if motor carriers charge the same rates and minimum weights as do their competitors the railroads. They have no right to require motor carriers to charge the equal of railroad carload rates but for a lower shipping minimum than the railroads impose. Should there be any among the shippers who, now and then in individual instances, might prefer to ship less than 30,000 pounds at one time it would, under the condemned tariffs, be their

*privilege* to do so at a slightly higher rate per 100 pounds. That is a *benefit*, not a *disadvantage*. They are not injured by that privilege which the motor carriers would extend to them. On the other hand the maintenance of different rates per 100 pounds by railroad and trucking companies on the ordinary commercial sale and shipping weight of 30,000 pounds would necessarily cause a disproportionate share of those usual shipments to move by railroad. The Commission has simply misapplied to a different set of facts an old doctrine not in dispute.

The inaccurate thinking of the Commission as to "reasonableness", sanctioned by the court below, is evident from the following quotation from the final report of August 11, 1942.

> "If rates 45 per cent of first class are reasonable on any shipments exceeding a truckload, they are reasonable for all truckload shipments unless the cost of transporting quantities exceeding a truckload is less than that of transporting a truckload."

That language is not understandable in relation to the ultimate conclusion which the Commission reached. The actual ultimate conclusion was that the *47.5 per cent* basis would be not more reasonable for all shipments in quantity *whether they might weigh only 20,000 pounds or whether they should weigh 30,000 or more pounds. There was no prohibition against the actual use of part of the space in the second truck whenever the quantity tendered should exceed the legal capacity of any one truck.* It is competition—not difference in operating expense—which causes the need for both the 45 and 47.5 per cent bases. When, in the quoted language, the sentence began with an "if" and proceeded to say that if 45 per cent would be reasonable for shipments weighing 30,000 pounds then it, too, would be reasonable for shipments of 20,000 pounds, the assumption was a superfluous one. Supposedly, in the light of the ultimate conclusion, the important question was not whether 45 per cent or 47.5 per cent of first class would be

reasonable rates per 100 pounds. It was determined that either, viewed as rates per 100 pounds, would be reasonable. The ultimate conclusion of the Commission, *independently of the amount of the rate per 100 pounds, was that any motor carrier quantity minimum weight would be deemed by it unreasonable as a matter of "policy" when it may exceed the carrying capacity of single truck vehicles ordinarily used*, unless some lower operating expense be shown.

It is the validity of that determination which is here involved. The rightness or wrongness of that policy conclusion of the Commission does not depend on the amount of the rate per 100 pounds.

Nor would it depend upon the presence or absence of two quantity rates in accordance with the mere choice of the shipper what weight to ship. If, in the tariffs here involved, there had been only the 70 per cent basis of small weight shipments and the 45 per cent basis on 30,000 pound shipments the policy view of the Commission majority would have been the same. That is readily to be deduced both from the involved reports themselves and from the Commission's decisions in subsequent cases where only the one "quantity" rate was involved. (See *Re Cigarettes and Tobacco*, 42 M. C. C. 1; *Re Coffee from Jacksonville*, 34 M. C. C. 625.)

In neither of those cases was there in the motor carrier tariffs a choice as between a rate for 20,000 pounds and a lower one for a greater quantity than could be loaded into single truck vehicles. There were before the Commission in both cases only single "quantity" rates, corresponding in each instance to those of the railroads, and both involving shipment weights greater than single truck vehicles could carry. Yet in both cases the Commission condemned as unlawful the motor carrier "quantity" rates. In the *Cigarette* case it permitted the motor carriers to charge the equivalent of railroad carload rates but only for a minimum weight smaller than the one imposed by the railroads. In

the *Coffee* case it forced the motor carriers to charge more than the railroad carload rates (although the lower railroad rate could be afforded by the motor carriers) and to be governed by a minimum weight smaller than the railroads require. Therefore, it is clearly apparent that this "policy" of the Commission does not depend upon the presence of two motor carrier quantity rates like those here. That broad Commission "policy" seeks to condemn the widespread practice of motor carriers throughout much of the country of governing their quantity minimum weights by established trade units of shipment at the equivalent of railroad carload rates.

Therefore, it is submitted, the ultimate conclusion of unreasonableness of the 30,000 pound motor carrier minimum weight was in law arbitrary, unreasonable, and competitively destructive.

## VI.

## THE CONCLUSION OF DISCRIMINATION BETWEEN SHIPPERS HAS NO RATIONAL BASIS IN FACT OR IN LAW.

If there be no discrimination in *fact* there can be none in law. Yet each of the three rates sought by the motor carriers to be published *is available to any and all shippers.* Absolutely no restriction or restraint would be imposed upon the mere choice of the individual shipper whether to tender 30,000 pounds, 20,000 pounds or less. Shipments of 30,000 pounds or more are characteristic of the linoleum industry, easily within the reach of the manufacturers and traders in that commodity, as evidenced by the railroad 45 per cent basis which is limited in its availability to the 30,000 pound shippers.

There is no finding by the Commission that while in form an uncontrolled choice of rates (dependent merely upon shipping weights) is offered yet that because of economic considerations the choice is actually available only to a

few. In cryptic but scrupulous language the Commission avoided with evident purpose the saying of any such thing because nothing in the record would have supported it. What the Commission did say was that discrimination between shippers of 20,000 and 30,000 pounds would exist as between those "who tender" the one shipping weight or the other! That was artful and adroit language. It is capable of implying yet avoided a statement that there are two actual and different *classes* of shippers, i. e. some "large" ones who by the nature of their business ship the larger weights of 30,000 pounds and others who are "small" and who *therefore must* ship only the smaller weights. There was no finding, however, and none would have been warranted by the record, that such is the fact. The size of the shipper has nothing to do with the size of his individual shipments. On the contrary the record and the Commission's report itself (when the words used be carefully noted) establish that in ordinary linoleum trade economics the choice of shipping weights offered by the motor carriers is purely and freely optional. Neither the Commission's findings nor the record before it disclose any "classes" of shippers, some being "large" and others being "small" such as adroitly implied by the Commission and wrongly supposed by the court below. *Nothing would be granted to one shipper and denied to another.* Each would have an equal opportunity to avail the lower or the higher rate in accordance with his mere choice of individual shipping weight. The size of the shipper has nothing to do with the sizes of his individual shipments.

There is, therefore, a complete absence of any "discrimination" in fact. If a retail drug store offers to sell one tube of tooth paste for 20 cents or two for 35 cents would it be practicing "discrimination" among its customers irrespective of the rightness of its motive or economy in doing so?

The legal fallacy of the Commission's conclusion in respect to this issue of discrimination is abundantly demon-

strated by four decisions of the Supreme Court involving the same principle. Twice before the Supreme Court has set aside Commission orders in which the Commission had concluded that unlawful discrimination would exist in cases where the rate or regulation offered by the carriers was freely available to any individual shipper. (*Penn Refining Company* v. *Western N. Y. R. R. Co.*, 208 U. S. 208, 221; *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42.) In each of these the Supreme Court declared that as a matter of law it is error for the Commission to suppose that an unlawful discrimination can exist when in fact there is no discrimination whatsoever in the mere offer of a conditional choice of rate or practice *freely* available to *any* shipper having an interest.

On the other hand, and rightly, in two other cases the Supreme Court has carefully distinguished instances of that sort and those in which both it and the Commission may consider that the apparent offer of a choice of rate or practice is merely nominal since only a few shippers of a particular class are capable of taking advantage of the more favorable terms. (*U. S.* v. *Chicago Heights Trucking Company*, 310 U. S. 344; *B. & O.* v. *U. S.*, 305 U. S. 507.)

The two lines of decision of the Supreme Court are wholly consistent but have not here been observed by the Commission or the court below. In the light of the stated facts and the carefully circumscribed findings of the Commission can it fairly be said that there is here no substantial question involved? Is it not rather the other way around: does not the Commission's conclusion of "discrimination" lack any rational basis in fact as well as in law?

In the *Mississippi Valley Barge Case*, 292 U. S. 282 neither the Supreme Court nor the Commission indicated any doubt concerning the legality of different transportation rates based upon different quantity shipments dependent upon the shipping weights tendered at any one time.

## VII.

## IN DISREGARDING COMPETITION BETWEEN MOTOR AND RAIL CARRIERS IN THIS CASE THE COMMISSION DID SO PURELY ARBITRARILY.

Government counsel, in their motion to affirm, agree that this Court has lately clarified very much the law of discrimination in transportation rates. Reference here is to the recent decision in *Barringer & Co.* v. *U. S.*, No. 520, October Term, 1942. If, contrary to the contention of appellants it were to be considered that there is a rational basis for the conclusion of some sort of actual discrimination among shippers, there would still remain the question of the sufficiency of the defense of "competition" likewise relied upon but which the Commission and the court below rejected.

The Government here concedes that the recent decision of the Supreme Court in the *Barringer Case* determined that differences between transportation rates may, because of competition, be determined lawful and not discriminatory, even in the absence of a difference in operating expense. That is to say even without a difference in operating expense the very purpose of meeting the rates and regulations of a competitor is to shrink the normal margin of profit in order to gain volume and thereby aid the enterprise as a whole.

Here the motor carriers candidly display to the Supreme Court this simple set of facts: on the very small shipments of linoleum they offer 70 per cent of first class as do the railroads; on any shipments weighing not less than 20,000 pounds (a single truckload) which might be tendered they offer 47.5 per cent of first class; and on the general trade unit of quantity shipments (30,000 pounds) they offer 45 per cent of first class as do the railroads. It is to compete with the railroads, on equal terms, that the lowest of these three rates, governed by the highest of the three minimum quantity shipments, were initiated in the involved tariffs,

regardless of the absence of any difference in operating expense. Because that competition for the larger but normal trade shipping units requires them to do so the motor carriers seek to go *below* their own separate rates for quantities not exceeding single truckloads. As no difference in operating expense was shown the fact in that respect must be taken to be that the motor carriers are shrinking their proper profits somewhat below the 47.5 per cent basis which the Commission found not unreasonable.

This entire competitive aspect of the matter was rejected by the Commission. But the language which it used convicts it of having done so in a purely arbitrary way and only for the purpose of serving its "policy" of excluding the trucking industry from participation in ordinary commercial trade units of shipment. This was its entire treatment of the subject:

First, it was said that a discrimination is not innocent, as a matter of law, because of the presence of competition, that such competition is a "factor" to be considered by the Commission, and that the presence of competition does not preclude a "finding" that the discrimination practiced is unjust. Those broad (and here undisputed) propositions were stated in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, which the Commission cited. Then the Commission goes on to say:

> "The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices."

As no party to the proceeding asserted to the contrary that mere generalization of statement by the Commission added nothing to the validity of its action. Merely to say that competition does not render lawful "unlimited" discriminations and prejudices settles nothing. It begs the whole question as to what are the duties of the Commission in respect to competition in a particular case since obviously, as in the *Barringer case*, and numerous others which preceded it, the Supreme Court has sanctioned the Commis-

sion's observance of competition as a lawful basis for the particular discriminations there involved.

But was it intended by the Supreme Court, in any of its decisions on this subject, to say that because the giving or not giving of important weight to the element of competition is an administrative function the Commission may act with respect to it in a purely arbitrary manner and assign no considerations whatsoever for its ultimate conclusion? Here, after indulging in the generalities above described, the Commission, in respect to this vital matter of competition, stated absolutely nothing in support of its rejection of the defense. It simply said:

> "The competition between rail and motor carriers for linoleum does not constitute such a dissimilarity in circumstance and conditions as to render legal the proposed discrimination."

Does this amount to anything more than to say in substance: "We have the authority to determine whether competition does or does not warrant a discrimination. As a matter of 'policy' we decide in this case not to recognize it"!

Did the Supreme Court, by any of its decisions, ever intend to invest the Interstate Commerce Commission with that kind of autocratic power? When it said that the recognition or non-recognition of competition is an administrative matter did not the Supreme Court mean that in arriving at its conclusions the Commission must set forth *some* persuasive considerations which would enable it to determine whether the Commission's action is purely arbitrary and hence beyond its authority? That administrative bodies, even when seeming to act within their authority, *must* make suitable findings on essential matters is one of the important ways of checking and guarding against action that is arbitrary.

The statute favors healthy competition between motor and rail carriers. Some strong statement of reason should accompany its disallowance. The Congressional policy

in terms forbids only "destructive" competition. (See the National Transportation Policy, enacted September 18, 1940, U. S. Code, Title 49, Sections 27, 301, and 901 Notes.) The Supreme Court accepted that construction of the statute in the *Scandrett Case*, 32 Fed. Supp. 995, affirmed 312 U. S. 661. In the *Barringer* decision the Supreme Court later sustained the validity of a discrimination by railroads based upon fair competition with motor carriers; does not the same statute recognize the right of motor carriers also fairly to compete with railroads? In the present Interstate Commerce Act, consisting of four parts, plus the "National Transportation Policy", there is clearly evidenced the purpose of Congress to preserve the right to engage in fair and reasonable rate competition but to forbid those competitive excesses which would be destructive of the general purpose of the statute to maintain a sound national transportation system. The very possession of the "minimum rate making power" as a safeguard against excesses is suggestive of the Congressional intent in that regard even before the "National Transportation Policy" was adopted. (*Mississippi Valley Barge Case*, 292 U. S. 282; *Milwaukee Coal Case*, 294 U. S. 299; *U. S. v. Ill. Cent. R. Co.*, 263 U. S. 515.)

Here the Commission found no forbidden excess of competitive effort by the motor carriers. It did not find threatened destructive injury to the railroads but on the contrary noted the withdrawal of railroad protest early in the hearing. It did not find any malicious purpose by the motor carriers. It did not find that the motor carriers had gone beyond what their competition with railroads required. It did not find that an undue burden on the other traffic of the motor carriers would be cast by this meeting of railroad competition on equal terms. It did not find that the legitimate competitive interests of the motor carriers would as well be served by different rates and minimum weights than those proposed. Having made no findings to any of those effects and having made no others to explain its rejection

of competition in this case the unwarranted invasion of managerial discretion finds no support in the statute.

In short, the real "policy" of the Commission, regarding motor carrier "quantity" rates, does not depend upon any question of discrimination. Neither the *Cigarette* nor *Coffee* cases before referred to involved an issue of discrimination. It was seized upon by the full Commission majority here (unlike Division 3) only as an afterthought and makeweight in the particular case.

In short, taken by the four corners, the Commission's majority report plainly reveals the arbitrary rejection of competition in the present case for no reason whatsoever except the supposed right to do so in order to serve a "policy" which nothing in the public interest appears to dictate.

## VIII.

## NO ISSUE OF EFFICIENCY OF OPERATION.

The court below, on its own responsibility, ventured the suggestion that the Commission's action in this case fits the notion of required "efficiency of operation" mentioned in U. S. Code, title 49, Sec. 316(i) and for that reason is sustainable. But the Commission did not put its decision upon any such ground and there is no seeming warrant for the court below to have done so. That is not the proper function of the judiciary. At the very most there was an isolated expression of doubt by the Commission whether, in respect to the partial use of a second truck vehicle on 30,000 pound shipments, would there "always" be available other freight to fill up the remainder of the space in that second vehicle. The language used was:

> "but it is doubtful whether less than truckload shipments from Boston to Dodge City or between intermediate points always would be available".

That was mere guesswork on the part of the Commission. The record before it was absolutely silent on such a subject.

The legitimate exercise of the Commission's authority may never rest upon mere expressions of "doubt" volunteered by the Commission out of its own general impression.

But it makes no difference. The Commission did not predicate its decision upon the exercise of any claimed authority to manipulate motor carrier rates to serve the Commission's own conception of what would or would not be efficient or economical. No issue of the sort was before the Commission. No decision on such a question was made. Whether authority existed to have made any such decision is not here involved. Whatever control, if any, might be possessed by the Commission over the efficiency of operation of transport companies its orders thereunder would have to be directed to a change of operation identified with reasonable certainty. Here the Commission did not disallow to motor carriers the privilege of physically transporting linoleum shipments weighing 30,000 pounds or more even though an overflow into a second vehicle would be required. It left motor carriers entirely free in that respect and therefore plainly was not exerting any claim of power over such a matter as the court below, of its own volition, volunteered in support of the Commission's order.

## CONCLUSION.

The motion to affirm should be denied and the case should proceed in regular order.

Respectfully submitted,

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